IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2006

CORAM:

THE HONOURABLE MR.JUSTICE S.TAMILVANAN

Criminal R.C. No.1511 of 2004

K.P.Chinnasamy .. Petitioner

Vs.

T.B.Kennedy .. Respondent

Criminal Revision Petition filed under Section 397 r/w 401 Cr.P.C, against the Judgment and Order in C.A.No.254 of 2002, dated 05.03.2004 on the file of Additional District & Sessions Judge / Fast Track Court - 3, Namakkal, reversing the conviction and sentence imposed in C.C.No.1 of 2000, on the file of District Munsif Court cum Judicial Magistrate, Paramathi.

For petitioner : Mr.R.Sankarasubbu

For respondent : Mr.N.Manokaran

O R D E R

The Criminal Revision is directed against the Judgment and Order, dated 05.03.2004, made in C.A.No.254/2002 on the file of the Additional District and Sessions Judge / Fast Track Court No.3, Namakkal, reversing the Judgment of conviction and sentence, dated 29.11.2002, passed in C.C.No.1/2000 on the file of the District Munsif-cum-Judicial Magistrate, Paramathi.

2. The revision petitioner herein is the complainant, who lodged the complaint against the respondent / accused, under Section 138 of Negotiable Instruments Act. According to the revision petitioner, the respondent had borrowed a sum of Rs.3,25,000/- from the petitioner on 01.02.1999 and executed a promissory note in favour of the petitioner. On 20.07.1999, towards the discharge of the said loan, the respondent issued a cheque for a sum of Rs.3,25,000/- and got back the promissory note. When the same was presented for payment before the Salem Central Co-operative Bank, Vellore Branch on 23.07.1999, it was returned as insufficient funds on 02.08.1999. The said dishonoured cheque was marked as Ex.P.1 before the trial court along with the receipt issued by the aforesaid bank for the dishonour of the cheque, which is marked as Ex.P.2 and the memo, dated

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27.07.1999 issued by the Indian Overseas Bank, Tiruchengode Branch stating insufficient funds was marked as Ex.P.3. The Branch Manager of the Indian Overseas Bank, Tiruchengode was examined as P.W.2, who has deposed before the trial court that Ex.P.1, cheque was sent for collection through Salem Central Co-operative Bank, Vellore Branch to his branch and the said cheque relates to the respondents savings bank account number 4991. As the respondent had only Rs.1,106.10/- in his credit, the aforesaid cheque issued for Rs.3,25,000/- was returned on account of insufficient funds by the Bank. Ex.P.4 is the copy of the legal notice, dated 10.08.1999 issued by the petitioner through his counsel and the postal acknowledgement has been marked as Ex.P.5. In support of his contention, the revision petitioner has also examined the Branch Manager of Salem Co-operative Bank, Vellore Branch as P.W.3, who has deposed that the Cheque, Ex.P.1 was sent through the Salem Central Co-operative Bank, Vellore Branch to Indian Overseas Bank, Tiruchengode Branch for collection and the same was dishonoured due to insufficient funds. At the instance of the respondent / accused, no witness was examined and no document was marked.

3. The respondent / accused has not denied that the cheque was not issued by him and further, the evidence of P.W.1 to P.W.3 and Ex.P.2 and Ex.P.3 would clearly establish that the cheque was issued by the respondent / accused in favour of the revision petitioner / complainant.

4. The learned counsel for the respondent / accused contended that the revision is not maintainable and in support of his contention, the learned counsel for the respondent cited the following decisions

a) 1999 (2) MWN (Cr.) (S.P.Thannermalai v. Sridevi)
b) 2003 Crl.L.J.149 (Krishna Kumar Gupta v. Mohammed Jaros)
c) 2003 Crl.L.J.102 (Krishna Kumar Gupta v. Mohammed Jaros)

and contended that the Criminal Revision preferred by the petitioner / complainant is not maintainable in view of Sections 397 and 401 Cr.P.C.

5. In the decision reported in 1999 (2) MWN (Cr.) (S.P.Thannermalai v. Sridevi), this Court referring a case in 1983 L.W. (Crl.) 166, has held that the court of sessions has no power to entertain a revision against acquittal in a case arising out of a private complaint when there is an effective remedy of appeal against acquittal, as law is clearly laid down by the Division Bench of this Court.

6. The aforesaid decision cited by the learned counsel for the respondent is applicable only for sessions court, since revision against acquittal before the sessions court is not maintainable under

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Sections 397 and 401 Cr.P.C. But here in this case, the petitioner / complainant filed a complaint under Section 138 of Negotiable Instruments Act r/w 142 IPC before the Judicial Magistrate and after the trial, the learned Judicial Magistrate convicted and sentenced the respondent / accused under the aforesaid Section for 6 months RI and also imposed fine of Rs.5,000/- and in default to undergo further period of 2 months RI. Against which, he preferred an appeal before the Additional District and Sessions Court / Fast Track Court No.3, Namakkal, which reversed the conviction and sentence imposed by the trial court, aggrieved by which, the complainant has preferred this Criminal Revision before this Court, since there is no appeal provision.

7. The decisions referred above is not applicable, since the criminal revision has been preferred before the High Court and not before the sessions court.

8. The learned counsel for the respondent further contended that the burden is upon the petitioner, being the complainant to prove the charges levelled against the respondent / accused and further contended that this court cannot interfere with the finding on appreciation of evidence, unless the finding of the trial court is perverse or contrary to the material on record, for which the learned counsel for the respondent relied on the following decisions of the Honourable Supreme Court of India reported in

a. 2006 (3) CTC 730 (Narayana Menon @ Mani, M.S. v. State of Kerala)

b. 2003 (1) SCC 1 (C.Antony v. K.G.Raghavan Nair)

9. In the decision reported in 2006 (3) CTC 730 (Narayana Menon @ Mani, M.S. v. State of Kerala) at page number 740, the Apex Court has held as follows :

> " 38. It was for the Appellant only to discharge initial onus of proof. He was not necessarily required to disprove the prosecution case. Whether in the given facts and circumstances of a case, the initial burden has been discharged by an accused would be a question of fact. It was matter relating to appreciation of evidence. The High Court in its impugned judgment did not point out any error on the part of the Appellate Court in that behalf."

10. In Kali Ram v. State of Himachal Pradesh reported in 1973 (2) SCC 808, the Apex Court has held as follows :

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"One of the cardinal principles which has always to be kept in a view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the Courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused..."

11. In the light of the decisions rendered by the Hon'ble Apex Court, it is clear that the initial burden is upon the complainant, who has filed the complaint under Section 138 of Negotiable Instruments Act.

12. Here in this case, the petitioner / complainant filed the complaint under Section 138 of Negotiable Instruments Act, against the respondent, based on Ex.P.1. In support of his contention, he has examined the Branch Manager of Indian Overseas Bank, Tiruchengode as P.W.2, whose evidence would establish that the cheque relates to the Respondent's Savings Bank Account No.4991, which was dishonoured on account of insufficient funds. It is not in dispute that the cheque contained the signature of the respondent. Though, the respondent had only Rs.1,106.10/- in his account, the cheque was issued for a sum of Rs.3,25,000/-. Further, after the dishonour of the cheque, the revision petitioner had sent a legal notice, dated 27.07.1999, the original of Ex.P.4 to the respondent, which was duly received under Ex.P.5, the postal acknowledgement by the respondent, but, admittedly, there was no reply from the respondent.

13. Therefore, in the light of the decisions referred above, I am of the view that the revision petitioner / claimant has clearly established his initial burden in proving the case.

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14. The learned counsel appearing for the respondent / accused contended that the cheque had been issued by the respondent in black for some other collateral purpose, which was misused by the revision petitioner. Had it been misused by the revision petitioner, at least after the receipt of the legal notice, the respondent could have sent his reply rebutting the averments of the revision petitioner, that would be a normal conduct of any person, but admittedly, the respondent did not sent any reply, even after the receipt of the legal notice sent by the revision petitioner, after the dishonour of the cheque. Further, the respondent has neither produced any supporting document nor adduced any oral evidence as rebuttal evidence to establish that the cheque had been issued by him for some other purpose and that was misused by the revision petitioner. Even, while the respondent / accused was questioned under Section 313 Cr.P.C, with regard to the incriminating circumstances available in the evidence of the petitioner / complainant, and witnesses, the respondent herein has raised only a total denial and in his reply, he never said that he had issued any signed blank cheque and that was misused by the revision petitioner. Therefore, it is not open to the respondent / accused to raise the defence in the revision, by way of advancing arguments against the available oral and documentary evidence.

15. It has been clearly established that the cheque relates to the Savings Bank A/c of the respondent / accused and the signature available in the cheque was also admittedly of the respondent / accused. When the cheque was sent for collection, the same was dishonoured, due to insufficient funds in the aforesaid Savings Bank A/c, account of the respondent / accused, but, there was no reply from the respondent / accused. In the aforesaid circumstances, the respondent / accused cannot simply raise a bald defence that the cheque had been issued by him in blank form, for some other purpose and that was misused. Even the said bald defence, he was not raised, while he was questioned under Section 313 Cr.P.C, before the trial court.

16. The Honourable Supreme Court of India has clearly ruled in the decision reported in 2003 (1) SCC 1 (C.Antony v. K.G.Raghavan Nair), at page number 4 as follows :

> " 6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below

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> in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court. "

17. It is seen that the trial court which had the benefit of seeing the witness in the witness box and also the demeanour of the witness, has held after properly considering the evidence both oral and documentary that the guilt of the accused under Section 138 of Negotiable Instruments Act has been proved beyond reasonable doubt, where as the appellate court, namely the Additional District and Sessions Court / Fast Track Court No.3, Namakkal has improperly reversed the findings of the trial court against the evidence available on record.

18. If the finding of the appellate court is against the evidence available on record or without any evidence to support such finding, it has to be construed as perverse finding. Here in this case, I am of the view that the Judgment of the appellate court, reversing the finding of the trial court is against the evidence available on record and hence, the same has to be construed as perverse finding, and hence, it is the duty of this court to interfere with the same, in order to render justice.

19. I therefore, find it reasonable to allow this Criminal Revision Petition, and to set aside the Judgment and Order passed by the appellate court, in order to confirm the conviction and sentence imposed by the trial court.

20. In the result, the Criminal Revision Petition is allowed and the Judgment and Order of the Additional District and Sessions Judge / Fast Track Court No.3, Namakkal, dated 05.03.2004, made in C.A.No.254/2004 is set aside and the Judgment of conviction and

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sentence imposed by the trial court in C.C.No.1 of 2000, dated 29.11.2002 is confirmed.

tsvn

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional District & Sessions Judge /
   Fast Track Court - 3, Namakkal.

2. The District Munsif Court cum Judicial Magistrate
   Paramathi.

3. The Public Prosecutor,
   High Court, Madras-104.

1 cc to Mr.N.Manokaran, Advocate, SR.54805

ms (co)

dv/20.12.06

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